United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,2[illegible]689
(Cr. No. 10[illegible]5)

Thomas H. Washington, Appellant,

v.

United States of America, Appellee .

Appeal From The United States District Court
FOR The District Of Columbia

JOHN H. HARMON, III
3005 Georgia Avenue, N. W.
Washington, D.C. 20001
Attorney for Appellant
(Appointed By This Court).

QUESTIONS PRESENTED

1. The first question presented is whether or not the failure of the Trial Court to grant appellant's pre-trial request for an examination and determination of his sanity at the time of the commission of the offense for which appellant stands convicted, by Legal Psychiatric Service, in light of defense trial counsel's contention that a screening by a private psychiatrist indicated that appellant at the time of the commission of the offense, was not criminally responsible; and in light of defense trial counsel's assurances to the Court below that such a screening would not in fact delay appellant's trial, constituted a denial of due process?

2. Ancillary to the first question is the query as to whether or not the Presiding Trial Judge, who did not pass on appellant's motion for examination by Legal Psychiatric Service, when examining the record of the pre-trial proceedings respecting appellant; should sua sponte have exercised his discretion to call for a hearing on the issue of

appellant's insanity; especially, when as here, defense trial counsel did not in fact pursue as one of appellant's defenses, the question of appellant's sanity or criminal responsibility?

3. A third question presented in this case is the question as to where the charge is rape; and corroboration of the charge requires that the accused be identified beyond a reasonable doubt; the Trial Court erroneously invaded the province of the jury, when that Court, after the jury had deliberated for one afternoon, been excused for the night, and on their return to the Court the following day requested, through their foreman, that they be supplied with a weather report for the date of the offense in question; permitted a copy of the weather report so requested to be submitted to said jurors with the Court's oral explanation of the phrase, "visibility was 8 miles", over the objection of defense trial counsel?

I N D E X

CASES CITED

I N D E X

JURISDICTIONAL STATEMENT

Appellant, Thomas H. Washington, Jr., was indicted on a true bill presented by a Grand Jury sitting in the Court below, on September 7, 1965; and charged therein with having violated Title 22, D. C. Code, Section 2801(1961 Edition, as amended).

Jurisdiction to try appellant in the Court below was grounded on Title 11, D. C. Code, Sections 521 and 963(1961 Edition, as amended).

Upon a finding and conviction as charged by a jury of his peers, appellant timely invoked the provisions of Title 28, U. S. Code, Section 1915.

Appellant is properly before this Court by virtue of having complied with the applicable sections of rule 41 of this Court, as they relate to the provisions of Title 28, U. S. Code, Section 1915.

STATEMENT OF THE CASE

Appellant was charged, indicted and convicted of having raped a certain female during the early morning hours of August 6, 1965; in violation of Title 22, D. C. Code, Section 2801(1961 Edition, as amended);(p. 15, Record on appeal).

Subsequent to his indictment, and upon his arraignment, appellant pleaded not guilty as charged, and through court appointed trial counsel, moved the Court below for a mental examination pursuant to Title 24, D. C. Code, Section 301,(1961 Edition, as amended);(p. 14, Record on appeal).

The Order of the Court below granting appellant's motion for a mental examination at Saint Elizabeths Hospital for a period of sixty days was signed on September 23, 1965, by the Presiding Trial Judge, Curran, J.; and extended to a similar motion of appellant's concerning another criminal prosecution, in which one of the charges therein, included the charge of rape;(p. 13, Record on appeal).

Said Order by Curran, J., directed Saint Eliza-

beths Hospital to make a determination as to appellant's competency to stand trial in the instant case; as well as to make a determination as to whether or not appellant was without mental disease or defect at the time of the alleged criminal offenses committed on or about August 6th and August 9th, 1965;(p. 13, Record on appeal).

In a two paragraph statement consisting in all of fifteen lines, Saint Elizabeths Hospital stated in part:"It is the opinion of the physicians that Mr. Washington is without mental disease or defect and that he is competent for trial in that he understands the nature of his charges and can properly assist counsel in his defense.";(p. 12, Record on appeal).

Subsequently, and without objection by defense trial counsel, the Trial Court, per McGuire, Ch. J., found appellant competent to stand trial on December 1, 1965;(p. 11, Record on appeal).

Thereafter, defense trial counsel did raise objections to the Trial Court's finding of December 1,

1965; by moving said Court, on or about January 21, 1966, for an independent psychiatric screening of appellant by Legal Psychiatric Service. Defense trial counsel stated in his motion inter alia, that a private psychiatrist who screened appellant, was of the opinion that at the time of the offense charged in the indictment, appellant was suffering from a mental disease; and that further, defense trial counsel was advised that Legal Psychiatric Service could examine appellant sufficiently in advance of his proposed date of trial, so as not to delay the start thereof;(pp. 8,9, Record on appeal).

The Trial Court, per McGuire, Ch. J., after argument by counsel, but without filing a memorandum of reasons, or making a statement on the record therefor; denied appellant's motion for screening by Legal Psychiatric Service, on January 28, 1966; (p. 10, Record on appeal).

Thereafter, and on March 30, 1966, Curran, J. presiding, appellant went to trial on the charge

of rape;(p. 1, Record on appeal). The Record filed on appeal, and the transcript of the proceedings had at trial, fail to show any subsequent inquiry either by the Presiding Judge, sua sponte, or by defense trial counsel concerning appellant's motion for independent psychiatric screening prior to trial.

At the close of the prosecution's case, defense trial counsel moved the Court for a judgment of acquittal raising among other reasons, the question of verity of identification. Said motion was denied by the Court;(Tr., p. 109).

At the close of all the evidence in the trial of this case, and after the jury had deliberated for one afternoon; been excused for the night; and reconvened to resume its deliberations the following day; the jury foreman requested of the Court via a written note, to have submitted to the jury a copy of the weather report for August 6, 1965;(Tr., p. 185).

Out of the presence of the jurors, the Presid-

ing Trial Judge, in ruling that he would permit the weather report to be so submitted, overruled defense trial counsel's objection to that part of said report which read:"Visibility 8 miles";(Tr., p. 185).

The Trial Court went one step further in the presence of the jurors, and extrapolated on the meaning of the above phrase by commenting:"I assume that means 8 miles clear visibility.";(Tr., p. 186).

This remark or explanation occurred at 10:05 AM, on April 1, 1966; and at 11:00 AM of the same date, the jury returned a verdict of guilty as charged; (Tr., p. 186).

Appellant was thereafter sentenced to ten years to thirty years on April 4, 1966;(p. 1, Record on appeal). This appeal followed.

POINTS RAISED ON APPEAL

1. The Court below, per McGuire, Ch. J., erred in its refusal to grant defense trial counsel's motion for an independent mental examination of appellant.

2. The Presiding Trial Judge, Curran, J., should sua sponte, have ordered such an examination, or at the least conducted a further hearing on the subject thereof, once defense trial counsel abandoned his proposed defense of insanity.

3. The Trial Court erred in permitting the weather report to be submitted for the jury's examination, after the jury had retired to deliberate upon the evidence adduced during appellant's trial.

4. The Trial Court erred in giving its explanation of the meaning of the phrase, "visibility was 8 miles".

5. If such an explanation was not error, the Court below did err by not giving the jury at that point a further instruction regarding verity of identification as respects the charge of rape.

SUMMARY OF ARGUMENT

By refusing to exercise its discretion to grant appellant's pre-trial request for an independent mental examination, the Court below committed reversible error; and this error was compounded further when that Court, 1) admitted the introduction of a weather report after the jury had retired to deliberate upon the evidence adduced during the trial and, 2) failed to give the jury a further instruction on the issue of verity of identification once the report had been admitted.

ARGUMENT

I

The Trial Court, per McGuire, Ch. J., erred in its refusal to grant defense trial counsel's motion for an independent psychiatric screening of appellant by Legal Psychiatric Service. It is submitted that the Trial Court's denial of the above motion defeated the very purposes for which in this jurisdiction, D. C. Code, 1961, Section 24-301, among other statutes, was intended.

In L. P. Mitchell v. United States, 114 U.S. App. D.C. 353, 316 F2d 354,(1963), it is effectively stated that the ordering of a mental examination serves two purposes. One purpose is to get evidence on whether the defendant is competent to stand trial; and the second purpose is to get evidence on whether, if there is a trial, the jury should be instructed on insanity and criminal responsibility.

That resort to the facilities of Saint Elizabeths Hospital for mental examination was not intended to be exclusive, is amply illustrated in, Brown v. United States, ____ U.S. App. D.C. ___, 331 F2d 822(1964). In that case, this Court in a Per Curiam opinion, states in pertinent part(with citations here omitted), at 331 F2d 822, 823:

> "On adequate averment, the defendant has the right to assistance of the court in developing the basis for his insanity defense. .. .. This assistance may take the form of a commitment for mental examination, examination through the Mental Health Commission or the Legal Psychiatric Service, or the appointment of private experts for this purpose. ..... ."

II

Notwithstanding error here alleged respecting denial of appellant's motion for an independent mental examination; it is further urged upon this Court that the Presiding Trial Judge should sua sponte(emphasis supplied), have ordered such an examination, or at the least conducted a further hearing on the subject thereof, once defense trial counsel abandoned his proposed defense of insanity.

A review of the Record on appeal in this case shows that the Presiding Trial Judge, Curran, J., granted the initial motion filed by appellant pursuant to the provisions of Title 24, Section 301, D. C. Code, 1961 Edition. On the Order granting the initial motion which committed appellant to Saint Elizabeths Hospital for a period of sixty days, is the notation that said Order was applicable to two criminal cases involving appellant. These two cases were 1000-65(out of which comes this appeal), and 950-65.

Criminal 950-65 in the Court below was a prose-

cution involving the charges of rape, robbery and assault with a deadly weapon. The charges of rape in the two cases were alleged to have been committed against separate prosecuting witnesses, during the early morning hours of August 6, 1965, and August 9, 1965.

Assuming arguendo(emphasis supplied), that appellant did in fact perpetrate these two offenses; can even a lay person with the barest minimum of an understanding of psychiatry accept the conclusionary report of Saint Elizabeths that appellant in effect was a mentally healthy individual who would perpetrate such heinous offenses in so short a time span?

The report of Saint Elizabeths signed by its Superintendent, Dr. Dale C. Cameron, can only be explained as a product of sound psychiatric procedure if it is assumed that said report was addressed solely to the question of appellant's competency to stand trial; and not to the question of

appellant's criminal responsibility.[1]

In this jurisdiction at least, it seems incredible that we are asked to believe that a man could rape two different women in the early morning hours, only three days apart, and yet be found free of mental disease or defect. The report from Saint Elizabeths gives no clue whatever as to how the psychiatrists at that institution reached their conclusion.

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See, for distinction between competency and criminal responsibility, James v. Boles, 339 F2d 431(1964), where at 433, the U.S. Court of Appeals for the Fourth Circuit quotes approvingly this Court's distinction as enunciated in Lyles v. United States, 103 U.S. App. D.C. 22, 254 F2d 725, 729, 730(1957).

Individual members of this Court have from time to time attacked the uninformative nature of such reports. Most recently, this Court, per Bazelon, Ch. J., in the case of Hansford v. United States, No. 19,436, decided July 6, 1966, on page 9, n. 13 of the slip opinion, characterized them as "conclusionary and uninformative boilerplate reports".

That the discretion to conduct further inquiry as to a defendant's competency and/or criminal responsibility can be exercised even where the defendant fails to interpose such a defense, or over the defendant's objection, is amply illustrated in Lynch v. Overholser, 369 U.S. 705, 8 L. Ed.2d 211, 82 S. Ct. 1063. More recently, Judge Holtzoff of the Court below, had occasion to treat of the subject in, Mullen v. Cameron,(D.C.D.C.) No. 133-66, May 23, 1966.

III

It is respectfully submitted by counsel for the appellant that the Trial Court erred in permitting the weather report to be submitted for the trial jury's examination, after(emphasis supplied) the

jury had retired to deliberate upon the evidence adduced during appellant's trial.

Where as here, defense trial counsel did not object to the submission of said weather report, objection was made and noted to the submission of that portion of the report which read, "visibility was 8 miles";(emphases supplied).

The error of the Trial Court lies in that Court's verbal explanation of this phrase, wherein at p. 186 of the Transcript, the Court states:"I assume that means 8 miles clear visibility." The Trial Court with this explanation erred in two respects: 1) Prior to making such a verbal statement of assumption in the presence of the jurors, the Trial Court should have exercised its discretion to have competent authority refresh its memory on the possible meanings of the phrase, "visibility was 8 miles".

In 20 Am. Jur. Sec. 97, the first paragraph thereof reads as follows,(with footnotes omitted herein):

> "Judicial knowledge is taken of scientific facts which are generally or universally known and which may be found in encyclopedias,

> "dictionaries, or other publications, as well as of scientific methods and instruments. However, such scientific facts must be of such universal notoriety and so generally understood that they may be regarded as forming part of the common knowledge of every person. Judicial cognizance will not be taken of scientific matters of uncertainty or matters which are in dispute, even though learnedly discussed in scientific publications. A judge may, in order to refresh his memory, resort to safe and proper means for that purpose."

2) The Trial Court erred further when, after submitting the weather report to the jurors along with the Court's explanation as to the meaning of a phrase contained therein, it failed to give the jurors a further instruction regarding verity of identification as respects the charge of rape.

The rule in this jurisdiction on the matter of corroboration in rape cases has been succinctly stated in Walker v. U.S., 96 U.S. App. D.C. 148, 223 F2d 613, 620(1955); where, to paraphrase this Court, per Bazelon, Ch. J., there must be evidence supporting a) the fact of penetration by force, and, b) the matter of the identity of the accused.

Verity of identification in this case was a very

crucial question, as is indicated by the jury foreman's note to the Trial Court where, in the last sentence the statement appears at p. 185 of the Transcript:"There are questions regarding the lighting conditions in the area."

In McKenzie v. U. S., 75 U.S. App. D.C. 270, 126 F2d 533,(1942), this Court found reversible error where, in a prosecution for rape and robbery, and verity of identification of the accused by the prosecuting witness was a point on which the case turned, the Trial Court failed to instruct the jury in plain words that if circumstances of identification were not convincing, the jury should acquit the accused.

CONCLUSION

Where, as in the instant case, the pre-trial proceedings could have more adequately disposed of the issue of criminal responsibility, without delaying appellant's trial, but did not for want of exercise of the lower Court's discretionary powers so to do; and where, as in the instant case, discretion was seemingly distended by the Court below with its explanation as to the meaning of a phrase in a weather report; the under-exercise and the over-exercise of such discretionary powers by that Court, begs for a reversal by this Court of the conviction below.

Respectfully submitted,

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(Appointed by this Court)

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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,233

THOMAS H. WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
SCOTT R. SCHOENFELD,
Assistant United States Attorneys.

Cr. No. 1000-65

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TABLE OF CASES

QUESTIONS PRESENTED

In the opinion of appellee. the following questions are presented:

1. Did the court abuse its discretion where it refused to order an independent psychiatric examination for the sole purpose of aiding appellant's proposed but never asserted insanity defense. after appellant had already been examined by the staff at St. Elizabeths and by his own private psychiatrist?

2. Did the court abuse its discretion in failing to impose the insanity defense *sua sponte* where appellant offered no evidence thereon and there was reason to believe. even had the trial judge known the facts. that he had made a tactical decision not to assert the defense?

3. Did the court abuse its discretion in admitting evidence of a weather report for the night of the offense in response to the jury's request and in failing to reinstruct them. where appellant objected only to a portion of the report as "inappropriate" and requested no additional instructions?

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TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,233

THOMAS H. WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted and tried to a jury before Judge Edward M. Curran on a charge of rape (22 D.C. Code § 2801). He was found guilty as charged on April 1, 1966. Thereafter, he was sentenced to serve ten to thirty years in prison. This Court authorized this appeal without prepayment of costs.

Pretrial Matters

By motion filed September 23, 1965 in this case and another,[1] together with an affidavit of the attorney rep-

[1] The case referred to is Criminal No. 950-65 in which appellant was convicted of rape, robbery, and assault with a deadly

resenting him, appellant moved the District Court for a mental observation to be conducted by the psychiatric staff of St. Elizabeths Hospital.[2] On the same day Judge Curran ordered appellant committed to the hospital for that purpose for a period not to exceed sixty days. By letter dated November 18, 1965 the hospital superintendent advised the court that in the opinion of the psychiatrists appellant was without mental disease or defect and was competent to stand trial. Without objection by appellant or his attorney, Judge Matthew F. McGuire on December 1 entered an order finding appellant mentally competent to stand trial.

Thereafter, on January 21, 1966 appellant filed a motion, again in both cases, for a "screening" by the Legal Psychiatric Services. This motion alleged that the insanity defense would be asserted, and that counsel had "had the benefit of the opinion of a private psychiatrist" who had examined appellant and was of the opinion that at the time of the offense appellant was suffering from a mental disease and his actions were the product of it. The motion also alleged that such a screening would not delay trial, was essential to assist appellant, and the "additional psychiatric evidence" would serve the interests of justice in view of the direct conflict between the private psychiatrist's opinion and that of the hospital staff. This motion was heard and denied on January 28 by Judge McGuire.

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weapon (22 D.C. Code §§ 2801, 2901, 502). That case is now on appeal before this Court as No. 20232, and briefs have been filed. The record in that case contains matters pertinent to the present case, and references are made to it herein. It is believed this Court may take judicial notice of such matters of record presently before it in another case.

[2] The motion and affidavit urged that the "bizarre nature" of the offenses charged, the fact that appellant had been accused by four women of sex crimes within a year, and that an interview with appellant by his attorney on September 21, 1965 from which the latter concluded appellant had mental problems be considered in ruling on the request for a mental observation.

On February 16, 1966, six weeks before trial in the present case, appellant went to trial in Criminal No. 950-65 before Judge Burnita S. Matthews and a jury. In that case appellant was represented by the same counsel who tried the present case.[3] Appellant's primary defense in that case, where the evidence showed he had been caught by police officers in the act of raping his victim, was insanity (G.Br. 2).[4] He there presented testimony of a private psychiatrist, Dr. Marvin L. Adland, who had examined him at the D.C. Jail on January 14, 1966 and who had concluded that appellant was suffering from an irresistible impulse resulting from a mental illness at the time of that offense which caused the offense (G.Br. 2-3).[5] Dr. Adland's testimony was rebutted for the Government by two psychiatrists from St. Elizabeths who opined that appellant had had no irresistible impulse or mental illness at the time of that offense, and that appellant's problem resulted from his small regard for other people and his inclination to take what he wanted when he wanted it (G.Br. 3-5). Appellant was unsuccessful in his insanity defense and was found guilty by the jury on all counts;[6] that case, as we have noted, is now on appeal.

The Trial

Without further proceedings, appellant with the same counsel went to trial in the present case on March 30, 1966.

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[3] Appellant's trial attorney in both cases was Mark Sandground; appearances were also made by his associate.

[4] The brief of the Government in No. 20232 is referred to as "G. Br."

[5] In that case the offense was alleged to have occurred on August 9, 1965; in the present case, on August 6, 1965.

[6] Appellant was sentenced in that case to five to fifteen years imprisonment on the rape count, and concurrent sentences of three to ten years on the second and third counts to be served consecutively to the sentence imposed on the first count.

The complaining witness, Cynthia Bryant, testified that she had driven to Fairlawn Park, S.E., sometime after 1 A.M. on Friday, August 6, 1965 with her cousin Kathleen Savoy and two male friends, one of whom was Earl Pierce (Tr. 12, 23, 39). After perhaps forty-five minutes sitting in the parked car, she and Earl Pierce went walking across the grassway in the park and were approached by two men who looked closely at them, spoke briefly, and went on (Tr. 13-14, 42). Shortly, the two men returned and the one identified by Miss Bryant as appellant put his arm at Pierce's neck and walked him off saying he wanted to talk with Pierce (Tr. 15). The other man stayed with Miss Bryant until appellant and Pierce returned, and Miss Bryant saw that appellant was holding a knife at Pierce's throat (Tr. 17-18). Appellant gave the knife to the other man, told Miss Bryant to undress, and when she refused he grabbed her, hit her in the mouth, and knocked her to the ground (Tr. 18, 49-51). Appellant, threatening to kill her, then had sexual intercourse with Miss Bryant (Tr. 19, 52). Thereafter, the other man also had intercourse while appellant took his turn holding Pierce at knifepoint (Tr. 20). When appellant and the other man left, Miss Bryant and Pierce returned to their car, told the others, and proceeded directly to D.C. General Hospital (Tr. 21).

Miss Bryant indicated that she could not clearly identify appellant from the first meeting in the park (Tr. 43). But she could identify him as her assailant from the time he approached to grab her (Tr. 53). She testified that there were lights on Anacostia Drive adjacent to but not in the park, and that the area of the park in which the attack occurred was not tree shaded (Tr. 22, 40-41, 44, 47). Miss Bryant was able to pick appellant from a group of about ten men several days later, and also identified him in the courtroom (Tr. 14-15, 23, 55, 107-108). She testified that she had not to her knowledge ever known or seen appellant before (Tr. 31-32).

Earl Pierce was also called by the Government. He confirmed that he had gone with Miss Bryant and two others to Fairlawn Park and that he and Miss Bryant were twice approached while walking by two men including appellant (Tr. 74, 76-77). He stated he was walked away and held at knifepoint at various times by both men (Tr. 75, 85-86). Although he did not see "anything" done to Miss Bryant, he heard her scream and saw appellant over her (Tr. 75-77). He saw Miss Bryant on the ground with her dress up and saw her lip bleeding afterwards (Tr. 75-76). Pierce agreed that there was no artificial illumination in the park and confirmed that the attack did not take place within the treed area (Tr. 83). He indicated that he was able to observe appellant's face at close distance on the first approach and thereafter, and that he was positive in his identification of him (Tr. 88-91).

Kathleen Savoy, Miss Bryant's cousin, testified that when she returned to the car Miss Bryant complained of being raped by two men and being hit in the mouth (Tr. 93-95).

Dr. Rosalie J. Meissner of D.C. General Hospital testified that she had examined Miss Bryant early on August 6, 1965. Although her findings indicated no intact sperm in smears tested and she could not say with medical certainty that there had been intercourse, she stated that Miss Bryant had a laceration of the lip and appeared disheveled. She also testified that there was a suggestion of trauma in that a menstrual tampon Miss Bryant had been wearing was displaced deeply within her vagina. (Tr. 61-65.)

Three officers of the Metropolitan and U.S. Park Police were called to testify concerning aspects of the investigation (Tr. 102-108). The Government before resting proffered to the defense the testimony of two further witnesses (Tr. 109).

A motion for judgment of acquittal was denied and the defense case proceeded (Tr. 109). Only two witnesses were presented in support of appellant's sole defense of

alibi.[7] Leon Durton, a friend of appellant, testified that he had seen appellant at a jazz concert in Brandywine, Maryland, a place a little more than ten minutes drive from the District of Columbia line, about 8:45 or 9 P.M. on the night in question and again about 12:30 or 12:45 A.M. after the show ended (Tr. 115-117, 121). Edward Huff, another friend, testified he had met appellant there about 12:15 or 12:30 A.M. and appellant had been with him until he left about 1:50 A.M. (Tr. 129). He claimed the band was still "going strong" when he left (Tr. 133, 139). Huff was impeached with three prior convictions (Tr. 137). Appellant's renewed motion for judgment of acquittal at the close of his case was denied (Tr. 141).

The single issue of alibi and identification was fully argued by the defense (Tr. 155-163). The court gave instructions, including a specific instruction on that defense, and the defense attorney expressed his satisfaction with the instructions as given at the conclusion (Tr. 171-182).[8]

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[7] Aside from the motions heretofore mentioned, no suggestion of possible grounds for an insanity defense were made known to the trial court, nor did appellant present the medical witness who had testified in the earlier trial. The matter simply was not raised at trial.

[8] The court's instructions in this regard were as follows:

> The Government contends that on or about August the 6th, 1965, the complaining witness, Cynthia Bryant, was raped by Thomas H. Washington, Jr. forcibly and against her will. The defendant contends that he is not guilty of the crime of rape because he was somewhere else.
>
> You are therefore instructed that if you believe, and believe beyond a reasonable doubt, that on or about August the 6th, 1965, within the District of Columbia, Thomas H. Washington, Jr. had carnal knowledge of a female named Cynthia E. Bryant forcibly and against her will, it would be your duty under the law to return a verdict of "Guilty as indicted."
>
> If you have a reasonable doubt about it or you do not believe that he was present at the scene of the crime, it would be your duty under the law to return a verdict of "not guilty."
>
> The defense in this case, ladies and gentlemen of the jury, is alibi. Literally translated, alibi means elsewhere, and the defense takes the position that this defendant couldn't be guilty because he wasn't there.
>
> Of course, proof of an alibi is not necessarily made beyond

The jury retired to deliberate at 2:51 P.M. and were excused at approximately 4:30 P.M. to resume deliberations the next day at 9:30 A.M. (Tr. 183). The court received a note from the jury foreman which requested a visit to the scene of the crime and a weather report for the night of the crime (Tr. 185).[9] At 10 A.M. the court recalled the jury and advised them that they would not be permitted to visit the scene because of the different conditions there, and then summarized the weather report (Tr. 185-186).[10] No objection was made other than to the last clause of the report to the effect that the visibility was eight miles (Tr. 185). The court in a single sentence explained that clause to the jury as follows:

"I assume that means eight miles clear visibility."

At 10:05 A.M. the jury again retired and a verdict was announced at 11 A.M. (Tr. 186.)

STATUTES INVOLVED

Title 28, United States Code, Section 1732, provides in pertinent part:

(a) In any court of the United States and in any court established by Act of Congress, any writing or

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a reasonable doubt nor by a preponderance of the evidence: if the evidence is sufficient on the question of alibi to raise in your mind a reasonable doubt as the Court has explained that term to you, then of course you must return a verdict of "Not Guilty." (Tr. 180-181.)

[9] The text of the note was as follows:

"Most persons on the jury are not familiar with the area where the crime was committed. Would it be possible to visit the exact site of the crime under similar lighting conditions as the time of the crime and also to obtain a report on the weather on the night of the crime? There are questions regarding the lighting conditions in the area."

[10] This was as follows:

"The weather conditions between 12:00 a.m. and 3:00 a.m. on August 6, 1965 were as follows: The weather at that time was clear. The temperature was in the low 70s, and the visibility was 8 miles."

> record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> * * * *

Title 22, District of Columbia Code, Section 2801, provides:

> Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years; *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: *Provided further*, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

SUMMARY OF ARGUMENT

I

The record is clear that appellant received a psychiatric examination by the St. Elizabeths staff as well as by his own private psychiatrist. Their opinions concerning his sanity at the time of the offense differed. The court did not abuse its discretion in refusing to order a further examination by the Legal Psychiatric Services staff for the mere purpose of resolving the conflict or cumulating the evidence in favor of a proposed but unasserted insanity defense.

II

Appellant failed to offer evidence at trial concerning his insanity defense, nor did he urge that defense in any way. The noticeable record indicates that the insanity defense proved unsuccessful for appellant in a prior trial growing out of a similar offense by appellant only three days after the present offense. In view of the minimal evidence of insanity before the trial judge and the apparently tactical nature of appellant's decision not to assert the defense here, the trial court may not be said to have abused its discretion under the *Whalem* doctrine because it failed to impose the defense *sua sponte*.

III

In response to the jury's request the trial court summarized for them an official weather report for the night of the offense, elaborated very slightly upon it, and dismissed them without further instructions. Appellant made no request or objection other than an objection as "inappropriate" to a single clause of the report concerning visibility. Under the circumstances the court acted appropriately within its discretion.

ARGUMENT

I. The trial court did not abuse its discretion in failing to grant appellant's motion for independent mental examination.

Appellant urges this Court to find reversible error in the failure of the trial court to grant his pretrial motion for an independent mental examination.[11] The thrust of appellant's argument is that, by this action, he was denied necessary assistance in developing the basis for an insanity defense.[12]

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[11] Appellant's Br. 8-9.

[12] See Appellant's Br. (i), 9. At no time, either at trial or on appeal, has any question been raised concerning appellant's com-

Yet the record shows appellant had already received the assistance of the court in being granted a mental examination on his own motion and committed to St. Elizabeths Hospital for that purpose.[13] Following certification by the St. Elizabeths superintendent of competency and absence of mental disease or defect, he had without objection been found competent by the court. Only several weeks thereafter, having obtained the services of a private psychiatrist who had examined him and concluded any offenses were the product of an irresistible impulse and mental illness, did he move for an examination by the Legal Psychiatric Services for the purpose of providing "additional psychiatric evidence" regarding the insanity defense. The record indicates no attempt whatsoever by appellant to assert the insanity defense at trial and, indeed, available facts compel the inference that appellant and his trial counsel purposely abjured that defense in this case.[14]

Of course, granting of an independent psychiatric examination, except in limited circumstances not here present,[15] lies within the sound discretion of the court. See *e.g.*, *Cooper & Kennedy* v. *United States*, 119 U.S. App. D.C. 142, 337 F.2d 538 (1964) (concurring opinion); *Watson* v. *Cameron*, *supra*; *Overholser* v. *Boddie*, 87 U.S. App. D.C. 186, 184 F.2d 240 (1950); *Appel* v. *Overholser*, 82 U.S. App. D.C. 379, 164 F.2d 511 (1947); *Overholser* v. *DeMarcos*, 80 U.S. App. D.C. 91, 149 F.2d 23, *cert.*

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petency to stand trial. Even in Criminal No. 950-65, where the insanity defense was presented at trial, there was no question of competency (G.Br. 2-3). Of course, appellant was properly found competent for trial in both cases. Counterstatement 2; *Whalem* v. *United States*, 120 U.S. App. D.C. 331, 346 F.2d 812, *cert. denied*, 382 U.S. 862 (1965). *Pate* v. *Robinson*, —— U.S. —— (No. 382, March 7, 1966), is sharply distinguisable.

[13] See Counterstatement 1-2, 5-6, for references to the record for this and the three following sentences.

[14] See *infra*, Argument II.

[15] See *Watson* v. *Cameron*, 114 U.S. App. D.C. 151, 312 F.2d 878 (1962).

denied, 325 U.S. 889 (1945); *DeMarcos* v. *Overholser*, 78 U.S. App. D.C. 131, 137 F.2d 698, *cert. denied*, 320 U.S. 985 (1943); *cf. Curry* v. *Overholser*, 109 U.S. App. D.C. 283, 287 F.2d 137 (1960). Appellant here is unable to suggest any persuasive reason why the court's discretion should have been exercised to grant his request for a third psychiatric examination. Certainly no abuse of that discretion appears on this record.

While appellant may properly demand the assistance of the court in developing the basis of his insanity defense, he here received such assistance by virtue of his commitment for examination to St. Elizabeths. See *Brown* v. *United States*, 118 U.S. App. D.C. 76, 331 F.2d 822 (1964). His mere dissatisfaction with the result of such examination, without so much as an averment of its inadequacy, is unconvincing of his need for further assistance.[16] See *Wynder* v. *United States*, 122 U.S. App. D.C. 186, 352 F.2d 662 (1965); *Burgman* v. *United States*, 88 U.S. App. D.C. 184, 188-189, 188 F.2d 637, 641-642, *cert. denied*, 342 U.S. 838 (1951). If under some circumstances appellant may not be required to accept Government psychiatrists on a take-it-or-leave-it basis, see *Cooper & Kennedy* v. *United States*, *supra* (concurring opinion), neither may he insist on multiple repeated examinations. *Wynder* v. *United States*, *supra*. Appellant has no absolute right to a psychiatrist of his own choice at Government expense, *Perry* v. *United States*, 121 U.S. App. D.C. 29, 347 F.2d 813 (1964), *cert. denied*, 382 U.S. 959 (1965); nor may the St. Elizabeths staff in the present pretrial examination situation appropriately be viewed as in a habeas corpus case where their role is clearly adver-

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[16] In his motion of January 21 appellant merely alleged a conflict in the evidence on insanity. Counterstatement 2. To the extent that he then had evidence on both sides of the question, the court's obligation of assistance would seem to have been more than fulfilled. But appellant would now have the court in effect required not only to provide assistance in the first place, but if the result is then conflicted, to provide further for a resolution of the conflict. He invokes no authority for this novel proposition.

sary.[17] Compare *Watson* v. *Cameron*, *supra*. Furthermore, appellant here had had the benefit of an examination by his own private psychiatrist, who in fact proved available to him at his earlier trial, and his pretrial motion in effect conceded that the only purpose of a third examination was to attempt to cumulate upon the private psychiatrist's evidence of insanity.[18] See *Burgman* v. *United States*, *supra* at 188-189, 188 F.2d at 641-642.

II. The trial court did not abuse its discretion in failing to impose *sua sponte* the insanity defense.

Appellant also urges reversible error in the failure of the trial court to inject the insanity defense,[19] although appellant during the course of trial neither raised nor urged the issue. The court's error, appellant claims, resulted from its acceptance of the "boilerplate" conclusions of the St. Elizabeths superintendent that appellant suffered from no mental disease or defect.[20]

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[17] Insofar as the provision of an independent psychiatric examination is justified by a purpose to minimize the effect of the possible bias of those with custody of a patient seeking release from their custody, such a consideration is absent here. *Cf. Naples* v. *United States*, 113 U.S. App. D.C. 281, 287, 307 F.2d 618, 624 (1962) (*en banc*). Indeed, it is interesting to note that, during cross-examination of one of the psychiatrists called from St. Elizabeths in Criminal No. 950-65, the doctor stated that he had probably testified as often for the defense as for the Government, if not more so. Criminal No. 950-65 Tr. 247. Also, there is no indication of a previous history of psychiatric treatment or difficulties of appellant in the record of either trial.

[18] Counterstatement 2. And see footnote 16, *supra*.

[19] Appellant's Br. 10-13. Although appellant's brief loosely employs language suggesting a "hearing", at (i), and concerning discretion of the court to inquire into "competency and/or criminal responsibility," at 13, we conclude that the facts and argument here present only the issue of *sua sponte* injection by the court of the insanity defense.

[20] See Appellant's Br. 11-13. Quite to the contrary, the superintendent's letter was quite informative and complete, although it did not attempt to describe the process by which its conclusions were reached. In addition to conclusions concerning competency

Again, the record undercuts appellant's position here. In his original motion and affidavit for mental examination granted September 23, 1965, appellant set forth merely the defense counsel's report of his interview with appellant and counsel's vague conclusion concerning appellant's mental condition as a basis for an examination.[21] [22] Even in the motion for a Legal Psychiatric Services examination on January 21, 1966, appellant nakedly asserted, without benefit of affidavit or offer of testimony, an opinion of a then unnamed private psychiatrist who had concluded differently from the St. Elizabeths staff, and he stated an intention to assert the insanity defense.[23] Although appellant did in fact interpose the insanity defense a few weeks before trial in the present case during the trial of Criminal No. 950-65, the fact remains that,

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and lack of mental disease or defect, it indicated that there was no evidence of "disturbance of emotions or thought processes" or of "hallucinatory or delusional experiences." Further, it reported that appellant's "attention, perception, comprehension, orientation, memory and general intellectual functions were all within normal limits." And it noted that appellant was able to discuss the charges in a rational and realistic manner.

In any event, we would point out that the "boilerplate" issue relates basically to the question of competency rather than to the insanity defense, on which latter hearings are not of course held. Compare *Pate* v. *Robinson, supra; Whalem* v. *United States, supra* (dissenting opinion); *Wider* v. *United States*, 121 U.S. App. D.C. 129, 348 F.2d 358 (1965); *Holloway* v. *United States*, 119 U.S. App. D.C. 396, 343 F.2d 265 (1964).

[21] See Counterstatement 1-3, 5-6, for references to the record for this and the following three sentences.

[22] See footnote 2, *supra*. In particular, counsel stated that at the September 21 interview appellant related "strange and bizarre" tales of "irresistible impulses" to wander the streets at early hours, that he could not control his "urges and callings," and that he was unaware of their cause or what happened after he had them. Counsel also said appellant's "manner of expression and communication" made communication with him difficult.

[23] The transcript of the hearing of this motion on January 28, 1966 adds little to the written motion. No witnesses were presented.

although the same counsel represented him, no evidence whatsoever relating to such a defense was offered during the trial here.[24] Appellant's lack of success with the insanity defense in the prior trial where, caught in the act, he had little chance of defending on other grounds, and the fact that the alibi defense offered in the present case would likely have been seriously prejudiced on the merits by a simultaneous insanity defense, strongly suggest that the decision not to present the insanity defense was a deliberate and intelligent tactical decision.

The proposition is long established that presentation of "some evidence" of insanity at the time of the offense raises the issue and requires submission to the triers of fact. *Davis* v. *United States*, 160 U.S. 469 (1895); *Durham* v. *United States*, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954). But more than a scintilla of evidence is required. *McDonald* v. *United States*, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962) *(en banc)*. The nature of appellant's offenses alone is clearly not enough. *Carter* v. *United States*, 108 U.S. App. D.C. 405, 283 F.2d 200 (1960); *Lebron* v. *United States*, 97 U.S. App. D.C. 133, 229 F.2d 16 (1955); but *cf. Plumber* v. *United States*, 104 U.S. App. D.C. 211, 260 F.2d 729 (1958) (dissenting opinion). Nor is a mere claim of irresponsibility sufficient. *Smith & Cunningham* v. *United States*, 122 U.S. App. D.C. 300, 353 F.2d 838 (1965). Indeed, where as here a claim of insanity was put forth only briefly in pretrial motions and then utterly abandoned at trial, it would seem that only the court's ignoring of the most blatant evidence of insanity could incur a finding of abuse of discretion. *Whalem* v. *United States*, *supra*; see *Smith & Cunningham* v. *United States*, *supra*.

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[24] Appellant in his Brief at 11-12 urges the nature and proximity of his offenses in the two cases as alone sufficient to raise the insanity defense. Aside from the lack of legal merit in this claim, see *infra*, he does not suggest how the trial court was to notice and act upon the facts presented at trial of another case before a different judge when counsel had failed to bring them to his attention.

While of course a defendant may not keep an insanity defense out of the case under all circumstances, *Overholser* v. *Lynch*, 109 U.S. App. D.C. 404, 288 F.2d 388 (1961), *reversed on other grounds*, 369 U.S. 705 (1962), neither is the court required to inject it under the present circumstances. Indeed, this Court has expressed particular concern with the possible prejudice to defenses on the merits resulting from simultaneous assertion of the insanity defense. See *Holmes* v. *United States*, —— U.S. App. D.C. ——, 363 F.2d 281 (1966); *Whalem* v. *United States, supra; Trest* v. *United States*, 122 U.S. App. D.C. 11, 350 F.2d 794 (1965), *cert. denied*, 382 U.S. 1018 (1966); *Harper* v. *United States*, 122 U.S. App. D.C. 23, 350 F.2d 1000 (1965), *cert. denied*, 383 U.S. 951 (1966). Where, as here, there is reason to believe appellant and his counsel chose not to assert the insanity defense in order not to prejudice their alibi defense, the case falls squarely within this rationale.[25] Certainly there is no basis to overrule the obvious tactical choice of appellant. *Whalem* v. *United States, supra; Trest* v. *United States, supra; Harper* v. *United States, supra.*

Furthermore, appellant fails even to suggest the existence of such a "combination of factors" as might have warranted the trial court, assuming it knew the facts, in exercising its discretion to impose the unwanted defense on him. See *Whalem* v. *United States, supra.*[26] Appellant had been determined to be competent for trial. No prior history of mental infirmity was suggested. The trial court had opportunity to witness appellant's demeanor in the courtroom during the three-day trial. And the court's papers on the case, while they indicated the existence of

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[25] Trial took place approximately six weeks before the *Holmes* dictum suggesting bifurcation in such instances was handed down.

[26] As the Court observed in *Whalem*:

> "No rigid standard exists to control the District Court in deciding whether it should require the insanity issue to be submitted. As a matter within the sound discretion of the District Court, this question must be resolved on a case by case basis." Supra at ——, 346 F.2d at 818-819, n. 10.

a contrary opinion, contained a full and unequivocal report of sanity from the St. Elizabeths superintendent.[27] In sum, the court did not abuse its discretion in failing to impose the insanity defense.

III. The trial court did not abuse its discretion in admitting a weather report with comment or in giving no additional instructions thereafter.

(Tr. 182, 185-186)

During the course of their deliberations the jury requested a weather report for the night of the crime, and the trial court responded by summarizing for them such a report from the Weather Bureau.[28] The court, in words almost identical to those summarizing the report, added a single sentence by way of clarification of the clause concerning visibility. No objection was made by defense counsel to the report itself or to the court's added explanation, nor was any request made for further instructions. Counsel objected solely to the inclusion of the clause giving the report on visibility as eight miles; no ground was stated other than that this was not an "appropriate part" of the weather report. (Tr. 185-186.) Nevertheless, appellant now claims error in the court's action in giving the full report with explanation, and in the failure to give supplementary instructions.[29]

Of course, the weather report itself is admissible. 28 U.S.C. § 1732; see *Evanston* v. *Gunn*, 99 U.S. 660 (1878). The objection at trial to a part of the report stated a vague and inadequate ground, and appellant here as well

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[27] In *Whalem*, where the court found no abuse of discretion by the trial court in failing to impose the insanity defense, the defendant had been diagnosed as psychotic and had been civilly committed to St. Elizabeths in the past. *A fortiori*, appellant's case would fall within the approved ambit of discretion.

[28] See Counterstatement 6-7, for references to the record for this and the following three sentences. Although the report appears in the transcript in quotation marks, it would appear from its form to be a summary by the trial judge.

[29] Appellant's Br. 13-17.

is unable to invoke pertinent authority for its exclusion. Indeed, exclusion of that part would have left the jury with a distorted version of the report and failed to clarify the point properly in issue in their minds.

Insofar as the court's explanatory comment and its failure to provide further instructions are concerned, these matters are discretionary. *Quercia* v. *United States*, 289 U.S. 466 (1933); *Burgman* v. *United States*, 88 U.S. App. D.C. 184, 187-188, 188 F.2d 637, 640-641, *cert. denied*, 342 U.S. 838 (1951); *United States* v. *Bayer*, 331 U.S. 532 (1947). Appellant's failure to object to the court's comment so as to give the court an opportunity to rectify any error should preclude his raising the point here. F.R. Crim.P. 30; see *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950). In any event, this would seem an unwarranted magnification on appeal of a matter of little importance in the setting of the trial. See *Glasser* v. *United States*, 315 U.S. 60, 83 (1942). Similarly, failure to request desired instructions should preclude appellant's contention in that regard particularly when as here appellant had expressed satisfaction with the original correct instructions as given (Tr. 182).[30] F.R.Crim.P. 30; *Williams* v. *United States*, 116 U.S. App. D.C. 131, 321 F.2d 744 (1963); *Villaroman* v. *United States*, *supra*. Certainly these matters, if error at all, do not rise to the status of prejudicial error.

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[30] See Counterstatement 6-7.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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